

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
OLLIE RICHARD TURNER,)	Case No. 01-11301
DEBRA DAWN TURNER,)	Chapter 7
)	
Debtors.)	
_____)	

MEMORANDUM OPINION AND ORDER

Creditor Deutsche Financial Services, Inc. (“DFS”) seeks allowance of an unsecured claim by requesting out-of-time an amendment of what it deems an informal proof of claim; DFS argues that its stay relief motion constitutes an informal proof of claim. The United States Trustee (“Trustee”) objected out of time. The case trustee, Edward J. Nazar, has not objected. The Court’s ruling will determine whether DFS may participate in the approximate \$15,000 distribution to unsecured creditors in this chapter 7 case. The Court has jurisdiction of this core proceeding pursuant to 28 U.S.C. §157(b)(2)(B).

Factual Background

On March 29, 2001, debtors Ollie Richard Turner and Debra Dawn Turner filed this chapter 7 case. The Turners owned and operated a mobile home dealership, Superior Housing, Inc.¹ When the Turners filed their case, the Court issued a notice of first meeting of creditors and noticed the case

¹ Superior Housing, Inc. is also a debtor in this Court, having originally filed a chapter 11 case in 2000, and is currently in a chapter 7 liquidation. *See* Case No. 00-11760. Superior’s case was converted from chapter 11 to chapter 7 in December 2000 (Dkt. 185). DFS was also a creditor of Superior Housing, having provided floor plan financing of approximately \$1.5 million. DFS had commenced a state court foreclosure action shortly before Superior filed bankruptcy. DFS actively participated in Superior’s bankruptcy as evidenced by the numerous docket entries in the Superior case, including obtaining relief from the automatic stay. *See* Dkt. 9, 10, 12, 18, 109, 116, 119, 139, 141, 142, 143, 177. DFS never filed a proof of claim in the Superior bankruptcy.

as a no-asset case thereby resulting in no bar date being set.² In May, the Trustee made a report of discovery of assets and the Court re-noticed the case, setting a bar date of August 22, 2001 for the filing of claims.³ Contrary to their representation in the application, both DFS and its counsel, Mark J. Lazzo, were served with the Order Fixing Time for Filing Claims.⁴

On May 22, 2001, DFS filed a motion for stay relief (“Motion”) seeking leave to enforce a state court judgment entered against the Turners in September 2000 in the amount of \$1,590,925.18.⁵ DFS sought to enforce its judgment lien in certain real property which was the subject of a contract for deed. The Motion also contained a demand for turnover of the estate’s interest in the contract as well as any rents or payments collected by the case trustee to date. The Motion did not contain any loan documents or other evidence of debt beyond the journal entry of judgment. In an order entered on August 7, 2001, this Court denied DFS’s Motion, finding that DFS’s judgment lien did not attach to the Turners’ vendor interest in the contract for deed. The order also denied DFS’s request for turnover.⁶ DFS did not file a proof of claim after denial of its Motion.⁷

On June 13, 2001, the Chapter 7 trustee filed an adversary complaint to determine and terminate DFS’s claimed security interest in the debtors’ contract interest in the contract for deed.⁸ On September 12, 2001, this Court approved an agreed journal entry in which DFS conceded that its

² See Fed. R. Bankr. P. 2002(e); Dkt. 3.

³ See Fed. R. Bankr. P. 3002(c)(5); Dkt. 9 and 10.

⁴ See Dkt. 11.

⁵ See Dkt. 13. The state court judgment was attached to DFS’s stay relief motion.

⁶ See Dkt. 19.

⁷ See Fed. R. Bankr. P. 3002(c)(3).

⁸ *Edward J. Nazar, Trustee v. Deutsche Financial Services Corporation*, Adv. No. 01-5126.

security interest in the debtors' seller interest in the contract for deed was not properly perfected and terminating DFS's claimed security interest. The journal entry was served upon counsel for DFS. Again, DFS filed no formal proof of claim after the September 12 journal entry denying and terminating DFS claimed security interest.

On or about June 28, 2001, DFS filed an application to extend the time to object to discharge under § 523. The application was granted without objection; the deadline to file nondischargeability complaints was extended 60 days, or until August 28, 2001. An order discharging debtors was subsequently entered September 10, 2001, without any § 523 complaint being filed by DFS.

On May 7, 2002, and again on July 8, 2002, the case trustee issued a notice of intent to file and issue final distribution pursuant to D. Kan. LBR 3001.1(d).⁹ According to the certificates of service contained thereon and this Court's docket, DFS was not served with either Rule 3001.1(d) notice, presumably because DFS had never filed a proof of claim. One secured creditor, Associates Housing Finance LLC, filed its amended proof of claim after the May notice. DFS, however, never filed a proof of claim on Bankruptcy Official Form 10 and never filed an amendment of same prior to the deadlines specified in the Rule 3001.1(d) notices.

The Chapter 7 trustee filed his final report and intended distribution on July 22, 2002.¹⁰ The final report provided for no distribution to be made to DFS. On August 8, 2002, DFS objected to the final distribution and, on the same day, filed an application to amend its prior informal proof of claim

⁹ See Dkt. 36 and 40. Local rule 3001.1(d) provides that in this District, proofs of claim (other than priority claims) may be amended up to the time the case trustee files the notice of final distribution. It further provides that when the trustee has not objected to secured claims, 20 days' notice of the intent to file a notice of final distribution must be given the holders of secured claims. The purpose of this rule is to give secured claim holders fair warning of the impending notice of distribution lest they fail to amend their previously-filed secured claims to provide for any unsecured deficiency they may seek to recover from the estate.

¹⁰ See Dkt. 41.

(i.e. the stay relief motion) from \$1.5 million down to \$473,068 (“Application”).¹¹ The United States Trustee filed a late objection to this Application on September 6, 2002 (the objection was due on August 29, 2002) and a motion to file its objection out of time, to which DFS objects.

The Court requested briefs of the parties and received a memorandum of law from DFS, but no response brief from the United States Trustee, whom the Court presumes relies on the citation of authorities in its objection. Having studied the authorities and reviewed the file, the Court is ready to rule. For the reasons discussed below, DFS’s Application is DENIED and its unsecured claim is disallowed.

Analysis

DFS argues that the Motion, filed well within the bar date for filing claims, constitutes an informal proof of claim as defined in controlling Tenth Circuit precedent. In *In re Reliance Equities, Inc.*,¹² the Court held that a trustee’s mere knowledge of the existence of a claim did not give rise to an informal proof of claim. Instead, the Court laid down five requirements, each of which must be met, in order to find that a particular document constitutes an informal and allowable proof of claim. The requirements for an informal proof of claim are: (1) the proof of claim must be in writing; (2) the proof of claim must contain a demand by the creditor on the debtor’s estate; (3) the writing must express an intent to hold the debtor liable for the debt; (4) the proof of claim must be filed with the bankruptcy court; and (5) based on the facts of the case, it would be equitable to allow the proof of claim.¹³

¹¹ See Dkt. 45 and 46. Attached as Exhibit B to DFS’s Application (Dkt. 46) is a formal proof of claim by which DFS seeks to amend its informal proof of claim. Exhibit B purports to amend DFS’s claim downward from the previous \$1.5 million in the stay relief motion to \$473,068.

¹² 966 F.2d 1338 (10th Cir. 1992).

¹³ *Id.* at 1345.

The Trustee relies on *In re Anchor Resources, Inc.*¹⁴ as its leading authority. This Colorado District Court decision predates (by one month) the Tenth Circuit decision in *Reliance*. However, *Anchor* provides a lengthy and learned history of the informal claim doctrine starting with cases decided under the Bankruptcy Act of 1898¹⁵ and leading up to present day. Moreover, *Anchor* deals with a stay relief motion as does the present case. Noting that a number of bankruptcy courts, applying the same five-prong test as *Reliance*, have held that stay relief motions did not contain demands by the creditor on the estate or express any intent to hold the debtor liable for the debt, the *Anchor* court held that a creditor's stay relief motion did not suffice as an informal proof of claim which would be allowed.¹⁶

In *Anchor*, the creditor's stay relief motion made no demand upon the estate regarding the claim, nor did it state an intention to hold the debtor liable for any part of claim.¹⁷ Thus, the district court held that the bankruptcy court correctly found that the stay relief motion did not rise to the level of an informal claim. The creditor's motion in *Anchor* appears to be less thorough than the Motion of DFS before this Court.

In addition to stay relief, DFS's Motion contains a demand that the trustee turn over to DFS the contract for deed as well as any contract payments which have been collected by the trustee or the estate. Moreover, attached as an exhibit to the Motion is the state court *in personam* judgment entered against the debtors, suggesting that DFS intended to pursue the debtors prior to bankruptcy.

¹⁴ 139 B.R. 954 (D. Colo. 1992).

¹⁵ See *In re Hotel St. James Co.*, 65 F.2d 82 (9th Cir. 1933).

¹⁶ Both *Reliance* and *Anchor* rely on the same case for the five-prong formulation cited in the main text, *In re Bowers*, 104 B.R. 362 (Bankr. D. Colo. 1989).

¹⁷ 139 B.R. at 957.

Applying the five-prong test described in *Reliance* and *Anchor*, this Court finds first that the DFS Motion is in writing. Second, the Motion, by virtue of DFS' inclusion of a demand for turnover, contains a demand by the creditor against the estate (albeit in no specific amount). Third, attaching the state court judgment evidences DFS's prepetition intent to hold the debtors liable for its claim. Fourth, DFS filed the Motion with this Court well within the bar period.

Only the fifth prong of the test, that of "equitable considerations," requires analysis and discussion. The fifth element requires a weighing of the equities. On the negative side, a formal proof of claim was never filed despite notice of the claim bar date being served upon DFS and its counsel. All of this would have been avoided if DFS had simply followed the rules and timely filed a formal proof of claim. DFS gives no reason why it failed to file a timely proof of claim.

DFS's inaction is even more perplexing given its active participation in this bankruptcy, as well as the related bankruptcy of Superior Housing, Inc. In this matter, DFS litigated the validity of its alleged lien in the course of both its stay relief motion and the chapter 7 trustee's adversary complaint. DFS knew as early as August 7, 2001 and no later than September 12, 2001 that it held no secured claim and that it was relegated to the status of an unsecured creditor.¹⁸ Yet DFS took no action after the September 12 order in the adversary proceeding that denied DFS's alleged security interest in the debtors' interest in the contract for deed to file a formal proof of claim as it would have been permitted to do by Fed. R. Bankr. P. 3002(c)(3).¹⁹ Like the creditor in *Reliance*, equity does not favor DFS where it had numerous opportunities to protect itself.

Moreover, DFS's Application sets forth no argument why no formal claim or timely

¹⁸ Stay relief and turnover were both denied by the order entered August 7, 2001 – prior to the claims bar date of August 22, 2001.

¹⁹ Pursuant to Rule 3002(c)(3) DFS had 30 days after the September 12, 2001 order to timely file a proof of claim.

amendment was filed. Instead, DFS alleges that certain dishonest prepetition actions by the debtors have resulted in DFS sustaining a substantial loss and that this loss tilts the equities in its favor. The debtors' alleged conduct, however, does not explain why DFS, a large, sophisticated, and well-represented creditor failed to file a timely proof of claim even after its alleged security interest was avoided on September 12, 2001. DFS has already had one "extension" of time in which to file its claim.

Finally, allowing DFS's "claim" would reduce by two-thirds the distribution payable to the other unsecured creditors who followed the rules. DFS asserts that the relatively small amount of funds in question (approximately \$15,000) justifies relief from compliance with filing timely. The Court notes that the notice of final distribution stated that some \$25,000 of unsecured claims would participate in the \$15,000 distribution, yielding a dividend of about 60 percent. With the addition of Associates Housing Finance's \$190,000 unsecured claim, the dividend is diluted to less than 7 percent. Were DFS's claim to be allowed at the amended amount of \$473,000, the dividend would be further reduced to approximately 2 percent.

In the Court's view, the only positive equitable consideration favoring DFS and allowance of its unsecured claim is its failure to receive the D. Kan. LBR 3001.1(d) notice. Even this failure, however, is the product of DFS's own doing. DFS could have avoided this eventuality by filing a timely and proper formal claim which, presumably, would have triggered service of a Rule 3001.1(d) notice upon it. Without a formal proof of claim on file, it was only after the notice of final distribution was filed that DFS attempted to amend its claim.²⁰

²⁰ The Court notes that, after the hearing on the case trustee's Final Report and Intended Distribution and DFS's objection, the trustee withdrew the Final Report pursuant to an order entered herein on October 23, 2002 (Dkt. 54), finding that the Final Report and Intended Distribution had omitted the unsecured claim of creditor Associates Housing Finance LLC which had timely amended its proof of claim and that the Final Report should be withdrawn to remedy that shortcoming and await the Court's ruling on the instant matter. The Court does not

Based upon the foregoing, the Court concludes that DFS's stay relief motion does not meet the five-prong test of *Reliance* for an informal proof of claim. The equities in this case militate heavily against allowance of an informal proof of claim and its amendment. On this basis, DFS's Application to amend and allow its unsecured claim is DENIED.

Dated this 2nd day of January, 2003.

ROBERT E. NUGENT,
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

consider the Trustee's position prejudiced by the withdrawal of the Final Report.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of this Memorandum Opinion and Order were deposited in the United States mail, postage prepaid on this 2nd day of January, 2003, to the following:

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